LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
DEC 2 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 751

SIDNEY J. UNGAR,

Petitioner,

—v.—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

JOHN G. BONOMI
Attorney for the Association of the Bar of the City of New York, Respondent

MICHAEL FRANCK
Of Counsel

INDEX

PAGE

Preliminary Statement 1

Statement of the Case 2

The Conviction for Criminal Contempt 2

Aiding and Abetting Violation of the New York City Charter 4

Obstruction of Justice 7

The Disciplinary Proceeding 16

POINT I—

Petitioner abandoned any claim under the Fifth Amendment of the Federal constitution and, in any event, the privilege against self-incrimination is only applicable when the possibility of criminal prosecution still exists 18

POINT II—

Petitioner was afforded full due process with respect to the charges predicated upon his conviction for criminal contempt 21

POINT III—

Petitioner erroneously contends that his conduct in aiding and abetting a violation of the conflict of interest provision of the New York City Charter could have resulted in criminal charges against him 24

PAGE

POINT IV—

Petitioner's participation in a scheme to obstruct justice was fully established by the evidence and the Referee so found 26

POINT V—

Disbarment for the conduct established does not violate due process 31

CONCLUSION 32

TABLE OF AUTHORITIES

Cases:

Boyd v. U. S., 116 U. S. 616 19

Ellis v. Dixon et al., Members of the Board of Education of the City of Yonkers, 349 U. S. 458 19

Ex Parte Wall, 107 U. S. 265 20

In re Isserman, 345 U. S. 286 31

Isserman v. Ethics Committee of Essex County Bar Association, 345 U. S. 927 31

Lynch et al. v. N. Y. ex rel. Pierson, 293 U. S. 52 19

Plymouth Sedan v. Pennsylvania, 380 U. S. 693 19

Ungar v. Sarafite, 376 U. S. 575 ..... 2, 21, 23

United States Constitution:

Fifth Amendment 18, 20

PAGE

Other Authorities:

Revised Rules of the United States Supreme Court:

Rule 8 20

Rule 40(3) 2

New York City Charter, Sections 886 and 901 (since renumbered) 5, 24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 751

SIDNEY J. UNGAR,

Petitioner,

—v.—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

Preliminary Statement

This is a petition for a writ of certiorari to review an order of the Appellate Division, First Department (hereinafter referred to as "the Appellate Division"), made and entered on April 21, 1966, which disbarred petitioner. On June 30, 1966, the Appellate Division denied petitioner's motion to amend the order of disbarment to recite that constitutional questions were raised and necessarily passed upon. On July 7, 1966, the Court of Appeals of the State of New York denied petitioner leave to appeal and dismissed his appeal taken as of right upon the ground that no substantial constitutional question was involved.

STATEMENT OF THE CASE

Although a lengthy statement of the case is contained in the petition, respondent finds it necessary, in accordance with Rule 40(3) of the Revised Rules of this Court, to submit its own statement, particularly with reference to the events which took place on the weekend commencing Friday evening, December 11, 1959, and ending Monday, December 14, 1959. Petitioner's conduct during this period, which was fully considered by the Referee in his report, is essential to an understanding of the obstruction of justice charge.

The Conviction for Criminal Contempt

The Referee concluded that petitioner's conviction for criminal contempt, having been affirmed by the Court of Appeals, and by this Court, *Ungar* v. *Sarafite*, 376 U. S. 575, could not be retried. He recognized, however, that the question of guilt was distinct from the question before him and the Appellate Division of what discipline, if any, the conviction warranted. Noting that the record in the criminal contempt proceeding contained no evidence of any facts or circumstances which petitioner might have been able to adduce in defense or mitigation of his conduct (Report p. 100),[1] the Referee ruled that petitioner would be permitted to present any such evidence he could.[2]

---

[1] Inasmuch as the petition does not refer to the pages of the Referee's report itself but to the page numbers of respondent's brief in the Appellate Division in which the report was printed as an Appendix, we do the same.

[2] The Appellate Division also refused to deny petitioner the right to call Judge Sarafite and Chief Assistant District Attorney Scotti as witnesses despite respondent's request that it do so. Petitioner nevertheless called neither (Report p. 101).

Petitioner testified that on the evening before the "outburst" which resulted in his conviction for criminal contempt, he had consulted a physician who prescribed certain pills. He further testified that he had taken 3 of these pills on the morning in question. The literature furnished by the manufacturer of these pills stated that a possible side effect could occasionally agitate the taker and result in hypermanic and manic episodes (Report p. 107). Petitioner testified that he did not learn of this possible side effect of the pills until the hearings before the Referee were in progress, some 4 years after the event (Min. p. 1966). The doctor who had prescribed the pills did not testify, having died some 2 years before the hearings (Report p. 107). Petitioner contended that immediately after the "outburst" he had gone to Beekman-Downtown Hospital where he was treated and received an injection (Report p. 108). No one from the hospital was produced before the Referee nor were any hospital records offered in evidence.

Petitioner called one witness present at the time of the "outburst", Assistant District Attorney Francis X. Clark. He testified that petitioner's conduct was deliberate (Report pp. 108-9).

The Referee reported that petitioner seemed to think he was entitled to use the witness stand to vindicate or exculpate himself in his own way, regardless of objections, not only by the court and the district attorney, but also by the attorney for the defendant who felt his client was being prejudiced by petitioner's lack of candor and frankness. The Referee also reported that petitioner frequently equivocated and fenced with the district attorney, first denying, and only when faced and pressed with prior testimony, reluctantly conceding that he had previously sworn dif-

ferently. Finally, the Referee reported that it was apparent from the proceedings preceding petitioner's contemptuous remarks that he was in full possession of his faculties and that there was no basis for finding that he spoke involuntarily or unintentionally. In this context, he noted that when the "outburst" occurred, petitioner's position, though voiced in language insolent and disruptive of the proceedings, was clearly, lucidly and coherently expressed, and though not legally sound, was rationally and sensibly stated from petitioner's point of view (Report pp. 109-10).

Aiding and Abetting Violation of the New York City Charter

Petitioner's payments for renovation of the apartment of Hulan E. Jack, then Borough President of Manhattan and a member of the Board of Estimate, were made in the period between January 1958, and April 1959 (Report p. 38). Prior to that time, petitioner had submitted to the City of New York a proposal for a Title I Slum Clearance Project in which, if it were approved, he expected to have a substantial interest as a 19% stockholder in the corporation which was seeking to be named sponsor (Report p. 42). The project and the sponsor would ultimately have to be approved by the Board of Estimate of which Jack was a member (Report p. 42).

On October 9, 1956, the Slum Clearance Committee gave its preliminary approval of the project and petitioner's sponsorship. In the Summer of 1957, the project was suspended and, in the Fall of 1957, petitioner was advised that his sponsorship would later be reviewed and reconsidered.

In July 1958, after petitioner's payments for the renovation of Jack's apartment had been made, his sponsorship was reconfirmed by the Slum Clearance Committee. The matter was thereafter to be passed upon by the Board of Estimate (Report p. 44).

The Referee concluded that throughout the period from 1956 to 1959, petitioner continued his efforts to have the project approved and his corporation designated as sponsor thereof by the Board of Estimate of which Jack was a member. Consequently, he found that petitioner was a person doing business with the City of New York and interested in city contracts within the meaning of then sections 886 and 901 of the New York City Charter which prohibited any officer or employee of the city to receive any gift, loan or thing or promise of value from any such individual (Report pp. 46-7).

Since the New York City Charter prohibited both, the Referee concluded that he need not determine whether the payments by petitioner on behalf of Jack were gift or loan (Report p. 38). However, the Referee did go into the question of petitioner's motive for the payments and his knowledge of their impropriety since that would have a bearing upon whether, and to what extent, discipline should be imposed (Report p. 39). In this context, the Referee reported on petitioner's extensive efforts to conceal his payments for the repairs in Jack's apartment.

The contractor, Fred Bechtel, testified that at the time the repairs in Jack's apartment were being discussed, petitioner had told him that this might be interpreted by others as a conflict of interest and that it was for that reason that he had used a false address on the original estimate

(Ex. 1; Min. p. 50) he prepared for the work in Jack's apartment. Bechtel further testified that at a later time petitioner had revealed to him that he was paying for the work in Jack's apartment because Jack could do many favors for him. The Referee noted that petitioner had admitted to the Grand Jury that he had told the contractor that Jack was in politics and probably could do many favors for him (Report pp. 47-8). In discussing the obstruction of justice charge, the Referee also noted that petitioner admitted having an understanding with Bechtel that he was not to reveal that petitioner was paying for the alterations in Jack's apartment (Report p. 52).

The payments by petitioner for the repairs in Jack's apartment were reported as leasehold improvements on the books of one of petitioner's corporations (Report p. 56) and were deducted on that corporation's income tax return for the year 1958 (Report p. 58).

Petitioner's office prepared and forwarded to Bechtel a contract (Ex. 2; Min. p. 67) covering the work at Jack's apartment, and a subsequent letter authorizing extra work (Ex. 3; Min. p. 63), both of which indicated that the repairs were to be made, not in Jack's apartment, but in a building owned by another corporation controlled by petitioner (Report pp. 60-1). This contract also falsely represented that Bechtel was doing the work for the corporation.

Petitioner and Jack, both of whom contended that petitioner's payments for the repairs were loans, denied any outstanding loans receiveable or payable, respectively, in documents signed by them subsequent to the payments by petitioner, although at the time no repayment had been made (Report p. 55).

The Referee also noted that when petitioner learned that the district attorney was looking into the matter of his payments for the work at Jack's apartment, he consulted an office associate, Harry Rosenblatt, Esq., concerning the applicability of the law of bribery and that, as a result of that conference, Rosenblatt examined the law dealing with "corrupt practices" as well (Report p. 49).

Obstruction of Justice

None of the documents concerning the repairs at Jack's apartment and petitioner's payments reflected the true circumstances (Report pp. 51-66). They indicated that the repairs were to be done at locations other than Jack's apartment; that the payments were for work other than that done in Jack's apartment; and that payments were made by corporations rather than by petitioner. Petitioner did claim that his first check to the contractor in the amount of $1000, was drawn on his special account and, therefore, disclosed that he had made the payment. That check, however, was neither produced before the Referee nor at the Jack trials. Moreover, petitioner's associate, Rosenblatt, testified that it was his recollection that the check had been drawn on one of petitioner's corporations and not on a personal account (Report p. 67).

Petitioner also contended that the true facts were reflected in a contract between Jack and the contractor (Ex. H; Min. p. 749). The contractor contended that he had never seen that contract. He stated that the only contract he had received for the repairs at Jack's apartment was the one which falsely recited that the work had been contracted for by one of petitioner's corporations and was to

be performed at a building owned by the corporation (Ex. 2; Min. p. 67). Petitioner produced his secretary who assumed responsibility for the preparation of the "inaccurate" contract (Ex. 2) and testified that she had advised petitioner of her mistake on December 14, 1959. On the very next day, December 15, 1959, petitioner in testifying before the Grand Jury, stated, when asked to explain the "inaccurate" contract, that he could not do so and theorized that one of the attorneys in his office might have made a mistake. The Referee noted that that testimony was inconsistent with the secretary's claim that she had made the mistake and so advised petitioner on the day preceding his testimony (Report pp. 61-5).

In this connection, the Referee also noted that the contract in Jack's name (Ex. H; Min. p. 749) which was produced by petitioner in the office of Chief Assistant District Attorney Scotti on the afternoon of December 11, 1959, set forth an agreed price of $3500, the exact amount of the false receipts (discussed *infra*) which Bechtel had prepared at petitioner's request that morning. This was significant since the "inaccurate" contract (Ex. 2), from which the secretary had testified she had copied the terms of the "Jack" contract (Ex. H), set forth the contract price as $3800 (Report pp. 64-5).

On May 15, 1958, the contractor, Bechtel, received from petitioner a check drawn on the same corporation named as a party in the "inaccurate" contract. On the back of that check, petitioner inserted a legend that payment was in full for all work done to date for all houses "under management or at management request". Although he contended that he had no knowledge of the "inaccurate" contract and that the work at Jack's apartment had nothing

to do with the corporation, petitioner interposed this check as a defense to a suit subsequently brought against him by Bechtel for a balance allegedly due for the work at Jack's apartment (Report p. 66).

After the district attorney's investigation had uncovered the fact that the entries in the books of one of petitioner's corporations showed the amount of the payments for the repairs at Jack's apartment as leasehold improvements on corporate property, the books were corrected. The minutes of the meeting of the board of directors (Ex. 12; Min. p. 2025) at which that was accomplished indicate that petitioner stated that the original entries had been erroneously made by the accountants of the corporation and that books, records and bills clearly indicated that petitioner had personally paid the contractor the amounts charged to leasehold improvements. This, the Referee concluded, was a deliberate misstatement since, in fact, there were no books or records or bills showing that petitioner had paid the contractor from personal funds (Report pp. 57-60).

In early December 1959, Bechtel was contacted by a reporter for the New York Post to whom he revealed that petitioner had paid for the Jack alterations (Report p. 67). On the following day, petitioner, from whom Bechtel had not heard for a period of over one year, telephoned the contractor, stated that he had been receiving telephone calls about the Jack job (referring to inquiries made of him by the New York *Post*) and requested to meet with him. An appointment was made for petitioner to come to Bechtel's home that evening (Report p. 68).

Petitioner sent his then partner, Norman Liben, Esq., to Bechtel's home in his place. Bechtel advised Liben that he had told the *Post* reporter that petitioner had paid him

for the repairs at Jack's apartment but that a balance of $1100 was still owing and that he had given the reporter certain documents concerning the work (Report p. 69). During this discussion between Bechtel and Liben, a telephone call was received from petitioner's former secretary, Rosalind Safrin, a personal friend of Bechtel. Mrs. Safrin arranged a meeting between Bechtel and petitioner for the following morning (Report pp. 69-70).

After leaving the contractor, Liben went to the home of petitioner's brother, as petitioner had instructed him to do. When Liben arrived, he found a conference in progress attended by petitioner, petitioner's wife, petitioner's brother and Hulan E. Jack. Liben reported what Bechtel had told him and it was then agreed that a false story would be concocted that Mrs. Jack had paid for the repairs from monies she had saved over a period of years from her household funds (Report pp. 70-72).

On the following morning, December 10, 1959, petitioner met with Bechtel and Mrs. Safrin. Petitioner asked and Bechtel agreed to make out false receipts showing that he had received payment from Mrs. Jack. Petitioner in turn agreed to pay Bechtel the $1100 which the contractor claimed was still due for the Jack job. Two hundred dollars of that amount was paid by petitioner at that meeting, the balance of nine hundred dollars was to be given to Mrs. Safrin to whom Bechtel would turn over the false receipts (Report pp. 73-4). On the following morning, Bechtel went to Mrs. Safrin's home and there made out four receipts (Exs. 6A, 6B, 6C, 6D; Min. pp. 379-380A), using different pens, each reciting the receipt "from Jack" of payment in the amount actually received from petitioner.

The false receipts were left with Mrs. Safrin for delivery to petitioner's wife (Report p. 75).

That afternoon, petitioner's wife asked Mrs. Safrin to come to her house to deliver the receipts but she was unable to do so (Report p. 76).

Sometime after leaving Mrs. Safrin's home, Bechtel was served with a subpoena requiring him to appear before the Grand Jury and to report to Mr. Scotti. Bechtel called petitioner and advised him that he had been served. Petitioner then called the district attorney's office to determine whether or not the paper served was in fact a Grand Jury subpoena. While waiting for an answer, petitioner turned the telephone over to Liben, his partner, who was advised that the contractor had indeed been served with a Grand Jury subpoena and had to appear in Mr. Scotti's office. Liben so advised petitioner (Report p. 78).

Petitioner then consulted his office associate, Rosenblatt, advised him about his "loan" to Jack for the alterations and asked him to look up the law. One of the things discussed was whether there was anything to implicate petitioner in bribery and Rosenblatt thereafter looked up various statutes pertaining to bribery and corrupt practices (Report pp. 78-9).

Bechtel did not immediately appear at petitioner's office to which he had stated he would come so that Liben, his then attorney, could accompany him to the district attorney's office. Consequently, Liben that afternoon telephoned the district attorney's office on two occasions to advise that Bechtel had not yet appeared. In one such conversation, he spoke to Scotti who told Liben that he should not represent Bechtel because there was a conflict of interest in-

volving his partner, petitioner. Liben advised petitioner of this conversation (Report p. 83).

Mr. Scotti suggested, in one of the conversations with Liben, that while they were waiting for Bechtel's arrival, petitioner should come over to his office. Liben so advised petitioner who then proceeded to the district attorney's office where he was interviewed by Scotti. At that time, petitioner falsely denied that he had anything to do with the payment for the repairs at Jack's apartment and that, as far as he knew, the payments had been made by Jack, Mrs. Jack or Jack's family (Report p. 81).

Bechtel ultimately arrived at Scotti's office with Liben and was also interviewed. He stated that he had been paid for the work by petitioner. When asked whether there were receipts, he stated that there were but did not explain that they were made out to "Jack" and not to petitioner. It was then late Friday afternoon and Scotti advised both petitioner, who was still present, and Bechtel that he wanted Bechtel to appear before the Grand Jury on the following Monday morning (Report p. 86).

After leaving Scotti's office, petitioner, Bechtel, Liben and Rosenblatt, who had also appeared at Scotti's office, returned to petitioner's office. The false receipts which Bechtel had prepared were discussed. Petitioner contended that he stated that the receipts were useless although, as the Referee noted, it is not clear why this should be so (Report pp. 86-7). Bechtel testified that he advised petitioner, in Rosenblatt's presence, that he had records at home which would show by whom and when the payments actually had been made and that he was then requested by Rosenblatt to bring them to petitioner's office on the

following morning when they were to be destroyed. Rosenblatt testified that no such conversation had taken place. The Referee noted that Rosenblatt had also denied knowing that Bechtel had been subpoenaed to appear before the Grand Jury on the following Monday although the subpoena was served in Scotti's office while Rosenblatt was present. The Referee concluded that if Bechtel's testimony concerning destruction of his records had been false, he would not have attributed it to Rosenblatt and thereby avoided the possibility of a denial by a disinterested person (Report pp. 87-8).

Petitioner and Bechtel left the office together and traveled uptown on the way to their homes. Bechtel testified that petitioner told him that he should consider that Jack had been in office for 20 years, should not hurt Jack's record, and should cooperate with him so that there would be no trouble (Report p. 89).

On the following morning, December 12, 1959, following a telephone call by petitioner to Mrs. Bechtel in which he advised that he was in the clear and that Bechtel should get himself a good lawyer, Bechtel proceeded to Mrs. Safrin's home to repossess the false receipts. Mrs. Bechtel took the receipts, tore them up and put them in her pocketbook. These torn pieces were turned over to Scotti later in the day when Bechtel decided to tell the full truth concerning the concocted story and the false receipts.

Jack testified that early on Saturday morning, December 12, 1959, petitioner had come to his home, told him that Mrs. Safrin had the receipts, that he had to get in touch with her, that he had told Scotti on the evening before that he had not made the payments to Bechtel, and that there

might be some trouble. Jack further testified that it was agreed that he and petitioner would continue to contend that the payments for the alterations had been made by Mrs. Jack (Report p. 93).

Jack denied that petitioner had in any way indicated that he would no longer participate in the concocted story, pointing out that petitioner had left his home for the avowed purpose of going to Mrs. Safrin to obtain the receipts (Report pp. 93-4).

While Bechtel was still at Mrs. Safrin's home, petitioner telephoned. He inquired about the receipts and was told they had been destroyed. Petitioner sounded hysterical and spoke to Bechtel, stating that he needed the receipts and that they should tell one story before the Grand Jury (Report p. 90).

Petitioner denied this conversation and contended that he had decided to tell the full truth and not participate in any further cover-up from the time that Scotti had served Bechtel with a Grand Jury subpoena on the previous afternoon. He denied that he had been of the opinion that if he, the contractor and Jack told the same story, the matter would be ended. He then admitted, however, that when he was questioned in Scotti's office, he was carrying out the same lie that was concocted at the meeting at his brother's home the Wednesday before and that he "figured" that if the contractor and he and Jack tell the same story, "that's the end of the whole business" (Report pp. 81-2).

Liben testified that petitioner called him at about noon on Saturday. Petitioner was practically hysterical and, in contrast to his attitude the evening before after leaving

Scotti's office, berated Liben for permitting Bechtel to implicate petitioner at Scotti's office on the afternoon of the previous day (Report p. 94).

Mrs. Safrin testified that she had been called to petitioner's home that Saturday evening and that, on the basis of her conversation with petitioner and his wife, she concluded that petitioner would very much like to have Bechtel change the statement he had given to Scotti the afternoon before (Report pp. 91-2).

Jack testified that on the following evening, Sunday, December 13, 1959, he met with petitioner at the home of his son. Petitioner stated that he was having difficulty and wanted to make sure that Jack's books would show his weekly payments to his wife from which it had been agreed it would be claimed she had saved the monies to pay for the alterations. Jack showed petitioner the records he had with respect to his payments to his wife for household expenses. When petitioner left, according to Jack, he was to continue his efforts to obtain false receipts (Report p. 94).

On the following day, Monday, December 14, 1959, Jack met with the District Attorney of New York County, Frank S. Hogan, and told him that Mrs. Jack had paid for the alterations. The Referee concluded that it was inconceivable that Jack would have persisted in the false story on Monday morning if petitioner had, as he claims, previously told him that he would not stand behind it and was going to tell the truth. The Referee noted that Jack's continued reliance on the false story on Monday was consistent with petitioner's testimony before the Grand Jury that his, petitioner's, decision to tell the truth had been made on Sunday

night (not on the preceding Friday as petitioner contended at the hearings) and that he had unsuccessfully tried to reach Jack on Monday morning to tell him (Report p. 95).

The Disciplinary Proceeding

Petitioner filed an answer to the charges instituted in the Appellate Division containing, as a fifth affirmative defense, a contention that inasmuch as he had testified before the Grand Jury and received immunity from prosecution, that portion of the disciplinary proceeding predicated upon his aiding and abetting Jack in violating the New York City Charter and conspiring to obstruct justice violated his constitutional privilege against self-incrimination under the Federal and State Constitutions and his right to due process of law. Respondent moved to strike all the affirmative defenses contained in the answer on the ground that they were insufficient as a matter of law. In an affidavit dated February 27, 1963, submitted in opposition to the motion to strike the affirmative defenses and in support of a cross-motion, petitioner's then counsel, Leonard B. Boudin, Esq., stated (para. 24, p. 9):

> "We pass over the reference to self-incrimination under the Federal Constitution. In all candor, it does not seem to respondent,[3] upon reconsideration, that the self-incrimination provisions of the Federal Constitution are involved although, of course, the right to Federal due process is involved. In this respect, petitioner would be entitled to a grant of its motion limited to striking out the reference to the Federal Constitutional privilege against self-incrimination."

[3] Petitioner here was the respondent in the Appellate Division.

The motion to strike was subsequently granted in all respects.

In seeking leave to appeal to the Court of Appeals of the State of New York, and in opposition to respondent's motion to dismiss his appeal as of right to that Court, petitioner made no reference to the fact that he had testified before a Grand Jury after having been granted immunity from prosecution and did not specifically refer to the fifth affirmative defense contained in his answer. In fact, in his affidavit of May 25, 1966, in support of his motion for leave to appeal, petitioner, in referring to the striking of his affirmative defenses, stated (p. 20), "Principally here involved are my Fourth and Sixth affirmative defenses, which pertain to the contempt charges".

Similarly, petitioner at no time contended, in either the Appellate Division or the Court of Appeals, that he was entitled to the standards of a criminal trial, including presumption of innocence or proof beyond a reasonable doubt, nor did he contend that he could be indicted under the applicable provisions of the New York City Charter. To the contrary, in his brief to the Court of Appeals in support of his motion for leave to appeal from the order of the Appellate Division disbarring him (p. 9), petitioner stated, in part, that "the rules of presumption of innocence and proof of guilt beyond a reasonable doubt are not applicable here"; and in the brief submitted by petitioner's counsel to the Appellate Division in opposition to the motion to confirm the report of the Referee (p. 10), petitioner stated that "The Charter provisions are *not* directed against the person who lends or gives the money" (emphasis not added).

POINT I

Petitioner abandoned any claim under the Fifth Amendment of the Federal constitution and, in any event, the privilege against self-incrimination is only applicable when the possibility of criminal prosecution still exists.

The principal ground advanced to support the petition for a writ of certiorari is the claim that petitioner's Fifth Amendment privilege against self-incrimination was infringed by the filing of disciplinary charges based on matters with respect to which his testimony before the Grand Jury was compelled by a grant of immunity (Pet. p. 22). This claim was first raised in the fifth affirmative defense contained in petitioner's answer to the petition instituting the disciplinary proceeding. It was, however, categorically abandoned by petitioner when, in an affidavit dated February 27, 1963 (p. 9), in opposition to respondent's motion to strike all the affirmative defenses, his counsel stated that, "in all candor, it does not seem to respondent, upon reconsideration, that the self-incrimination provisions of the Federal Constitution are involved". Consequently, the Appellate Division did not consider any claim under the Fifth Amendment's privilege against self-incrimination and did not pass upon it.

Having abandoned the contention in the Appellate Division, petitioner did not raise it in the proceedings in the Court of Appeals of the State of New York wherein he sought to appeal his disbarment as of right and by motion for leave to appeal. Thus, the petition for a writ of certiorari, in summarizing the arguments raised in the Court

of Appeals, does not refer to any claim arising under the privilege against self-incrimination (Pet. p. 21).

In these circumstances, it is respectfully submitted that the jurisdiction of this Court has not been preserved since it does not affirmatively appear from the record that the federal question here urged was presented to the State courts, *Lynch et al.* v. *N. Y. ex rel. Pierson,* 293 U. S. 52; *Ellis* v. *Dixon et al., Members of the Board of Education of the City of Yonkers,* 349 U. S. 458.

Petitioner's contention that the immunity he received from prosecution for any crimes revealed in his testimony before the Grand Jury also immunized him against any disciplinary proceeding is, moreover, totally without merit. Adoption of the proposition urged by petitioner would mean, for example, that an attorney who had bribed a public official and had been given immunity from prosecution for the crime in order that his testimony might be used in criminally prosecuting the public official, would thereafter not only be immune from prosecution for his own crime but would have to continue to be certified as an attorney in good standing by all the courts to which he was admitted and could even continue to practice before the very agency he had corrupted. Such an astounding proposition finds no support in the Fifth Amendment or any of the decisions of this Court thereunder.

Boyd v. *United States,* 116 U. S. 616, and subsequent decisions of this Court which followed it, relied upon by petitioner (Pet. p. 23), are clearly distinguishable. As this Court noted in *Plymouth Sedan* v. *Pennsylvania,* 380 U. S. 693, 701, the *Boyd* situation required a determination that the criminal law had been violated. Consequently, if the

defendant were compelled to give testimony, he would be asked to provide evidence to establish the commission of crimes on his part for which he could thereafter be prosecuted since, unlike the present case, he had received no immunity from prosecution.

The applicability of the Fifth Amendment privilege against self-incrimination is, by its own terms, limited to situations where compelled testimony could be used in "any criminal case". Here petitioner had received immunity from any criminal prosecution. Consequently, immunity as broad as the privilege had been granted.

The privilege does not protect against the use of compelled testimony in disciplinary proceedings. These are civil rather than criminal in nature. Petitioner himself acknowledged this when, in his brief to the Court of Appeals of the State of New York in support of his motion for leave to appeal from the order of disbarment, he stated, in part, that "the rules of presumption of innocence and proof of guilt beyond a reasonable doubt are not applicable here". That disciplinary proceedings are essentially civil rather than criminal in nature was recognized by this Court as far back as 1882 when it so declared in *Ex Parte Wall*, 107 U. S. 265, 288. Its rules concerning the discipline of attorneys admitted to its bar have been predicated upon that assumption. Thus, where it is shown to this Court that any member of its bar has been guilty of misconduct, he is forthwith suspended from practice and thereupon offered the opportunity to show good cause why he should not be disbarred (Revised Rule 8). Contrary to the procedure applicable to criminal cases, the "accused" is thereby required to come forward to explain his conduct.

The record discloses that petitioner was not misled concerning the extent of the immunity afforded to him before the Grand Jury. Thus, in response to the prosecutor's question at the Jack trial, petitioner conceded that it was his understanding that while he had received immunity from prosecution for crimes, he had not received immunity from any "disbarment proceeding" that might be instituted (Pet. Ex. 11, p. 321; Min. p. 1734).[4]

POINT II

Petitioner was afforded full due process with respect to the charges predicated upon his conviction for criminal contempt.

This Court specifically held that the requirements of due process were satisfied in the course of the criminal contempt proceeding which resulted in petitioner's conviction, *Ungar* v. *Sarafite,* 376 U. S. 575, 589. These, the Court noted, included the right to be adequately advised of the charges, a reasonable opportunity to meet the charges by way of defense or mitigation, representation by counsel, and an adequate opportunity to call witnesses.

The Referee concluded that the fact of the conviction and its affirmance precluded him from conducting a retrial of the charge that petitioner had been guilty of criminal contempt. By this he meant, of course, that he could not

---

[4] Significantly, the petition cites the question but not petitioner's answer (Pet. p. 8). Petitioner argues that the asking of the question demonstrates that his disbarment was in the mind of the prosecuting attorney from the very outset. This is sheer speculation and, in any event, irrelevant. Since petitioner was a prosecution witness, the question was apparently asked in front of the jury to indicate that petitioner had substantial motive to minimize the impropriety of the conduct in which he engaged with the defendant, Hulan E. Jack.

reverse the Appellate Division, the Court of Appeals of the State of New York and this Court. He did not, however, as the petition implies (Pet. p. 26), hold that the conviction itself automatically provided grounds for petitioner's disbarment. Quite to the contrary, the Referee stated that he was prepared to receive in evidence any facts or circumstances which petitioner might be able to adduce in defense or mitigation of his conduct with reference to the question of what discipline, if any, the conviction warranted (Report p. 100). Over the vigorous protest of respondent, the Referee indicated that he was even prepared to allow petitioner to call Judge Sarafite, before whom the criminal contempt had taken place and who had convicted petitioner therefor, as well as Chief Assistant District Attorney Scotti who conducted the prosecution of the case in which the criminal contempt occurred. Nevertheless, petitioner called neither (Report p. 101).

Petitioner called only one of the persons who was present at the time of the events which led to his conviction, Assistant District Attorney Francis X. Clark. Clark testified that petitioner's conduct on the occasion in question was deliberate (Report pp. 108-9).

The medical evidence adduced by petitioner was extremely limited. It consisted solely of literature which indicated that certain pills which petitioner had been taking on the morning in question *might* have a side effect which could agitate the taker. Petitioner sought thereby to create the inference that he had in fact suffered such a side effect. However, his own testimony discounted that possibility, since he acknowledged that he did not even suspect such a side effect and did not learn of it until the hearings be-

fore the Referee were in progress, some 4 years after the event (Min. p. 1966).

Of utmost significance in this context, is the fact that although petitioner contended that immediately after the "outburst" he had received medical attention at a hospital (Report p. 108), in the course of which his actual physical condition at the time was presumedly observed, he produced neither hospital records nor testimony from anyone at the hospital.

The Referee nevertheless examined the record of petitioner's testimony at the Jack trial on days when he concededly was not taking the pills in question to determine his state of mind at the time of the "outburst". Citing prior clashes between petitioner and the Court and the District Attorney, the Referee concluded that there was no evidence of any marked change in petitioner's demeanor at the time of the "outburst". Consequently, there was no evidence that the remarks constituting the contempt had been involuntarily or unintentionally uttered (Report pp. 109-10). The Referee reported that petitioner had not presented any justification or adequate excuse, mitigation or extenuation of his conduct (Report p. 111).

The Referee's conclusion in this regard is completely consistent with that reached by this Court, which found that the pattern of petitioner's conduct which culminated in the events for which he was convicted began at the very outset of the trial, *Ungar* v. *Sarafite, supra,* at 576-79.

It is clear, in any event, that petitioner was afforded all of the elements of due process referred to in the petition in the course of the disciplinary proceeding. The Referee was completely impartial, having had no prior contact

whatsoever with the Jack case or the proceedings leading to petitioner's conviction. Petitioner was afforded the right to cross-examine adverse witnesses and to call any witness who, in his judgment, had relevant testimony. Finally, petitioner had full right to counsel and was, in fact, represented at the outset of the proceedings but, for reasons of his own, discharged his attorney prior to the hearings and conducted them *pro se*.

POINT III

Petitioner erroneously contends that his conduct in aiding and abetting a violation of the conflict of interest provision of the New York City Charter could have resulted in criminal charges against him.

Petitioner argues that the charge against him in the disciplinary proceeding predicated upon his aiding and abetting a violation of the conflict of interest provisions of the New York City Charter alleged a crime on his part and that, consequently, he was entitled to the standards of proof and presumption of innocence applicable in criminal cases (Pet. pp. 31-2).

In the first place, this contention is here raised for the first time. Petitioner effectively so concedes for, in summarizing the points raised by him in the Court of Appeals, he himself does not contend that this contention was presented (Pet. pp. 21-2). Moreover, the contention itself is predicated upon an erroneous interpretation of the relevant statute. The conflict of interest provisions of the New York City Charter involved are Sections 886 and 901 (since renumbered) of the Charter. The relevant portions of their text is set forth in the petition (Pet. pp. 3-4). It will be

noted that by their very terms these statutory provisions are directed solely to officers and employees of the City of New York who are therein forbidden to accept any gratuity, loan or other thing of value from persons interested in city contracts or whose interest may in any way be affected by the official action of the officer or employee in question. These statutes are in no sense directed to the persons who offer or pay such gratuities, loans or other things of value. Consequently, there is absolutely no basis for petitioner's contention that he could have been subjected to criminal prosecution for his participation in the violation of these provisions which occurred when Hulan E. Jack, then Borough President of Manhattan, accepted a loan or gift from him. To the contrary, in the brief submitted by petitioner's counsel to the Appellate Division in opposition to the motion to confirm the report of the Referee (p. 10), petitioner stated that "the Charter provisions are *not* directed against the person who lends or gives the money" (emphasis not added).

It being clear, therefore, that the conduct underlying this charge could not under any circumstance have subjected petitioner to criminal prosecution, it follows that his argument that he should have been entitled to criminal standards predicated upon that assumption must fall. Thus, petitioner himself advised the Court of Appeals in his brief in support of his motion for leave to appeal from the order of disbarment (p. 9) that "the rules of presumption of innocence and proof of guilt beyond a reasonable doubt are not applicable here".

It does not follow, in any event, that merely because certain alleged conduct could be the basis for criminal prosecution, all proceedings involving consideration of such con-

duct must be conducted under criminal standards. Thus, for instance, conversion of funds may subject the taker to both criminal prosecution and a civil suit for recovery of the funds involved. Yet, no one would contend that in the civil suit, the alleged taker is entitled to either the presumption of innocence or proof beyond a reasonable doubt.

POINT IV

Petitioner's participation in a scheme to obstruct justice was fully established by the evidence and the Referee so found.

By the simple expedient of ignoring all but one paragraph of the forty-five pages of the report (Report pp. 50-95) devoted to the charge that he conspired to obstruct justice, petitioner argues that the Referee did not find this charge established. The relevant portions of the report are summarized at pages 7-16 of our Statement of the Case, *supra*. It reveals the following conduct on the part of petitioner:

On December 11, 1959, petitioner learned that Bechtel, the contractor he had paid for the repairs at Jack's apartment, had been served with a Grand Jury subpoena. Petitioner thereupon consulted an office associate, Rosenblatt, told him about the monies he had paid on behalf of Jack and discussed the possible applicability of the law of bribery. As a result of that conference, Rosenblatt looked up the law, including statutes pertaining to "corrupt practices". On the basis of that evidence, in part brought out by Rosenblatt, petitioner's own witness, the Referee concluded that petitioner's denial that he knew that a Grand Jury investigation was in progress and that he himself

later proceeded to the District Attorney's office solely for the purpose of discussing matters other than the Jack case "is patently untrue" (Report p. 83).

At the time petitioner learned that Bechtel had been served with a Grand Jury subpoena, he knew that all records and documents pertaining to the Jack job concealed the true facts. He also knew that all those having knowledge of the true facts surrounding the repairs at Jack's apartment had agreed to tell a concocted story that Mrs. Jack had paid for the repairs out of monies she had saved from her allowance for household expenses. Petitioner also knew that, at a meeting on the previous day, Bechtel had agreed to prepare false receipts to substantiate this concocted story. Petitioner's wife, sometime on the afternoon of the day that Bechtel was served with the subpoena, called Mrs. Safrin, with whom the false receipts had been left, to obtain delivery.

With that knowledge in mind, petitioner proceeded to the office of Chief Assistant District Attorney Scotti and there falsely denied that he had had anything to do with the payments for the repairs at Jack's apartment and that, as far as he knew, Jack, Mrs. Jack or a member of Jack's family had made the payments. He acknowledged that he was carrying out the concocted story previously agreed upon and felt that if everyone told that story the matter would be ended.

While petitioner was still present in Scotti's office, Bechtel appeared and was interviewed. Scotti then advised petitioner that there was a conflict between his and Bechtel's version of the events and that Bechtel would have to reappear on the following Monday to testify before a Grand Jury.

Petitioner then returned to his office together with Bechtel who was asked to produce all of his records concerning the Jack job on the following morning so they could be destroyed. Rosenblatt, to whom Bechtel attributed the statement that the records would be destroyed, denied that he had said anything of the kind, but the Referee did not credit his denial (Report p. 88).

On the following morning, December 12, 1959, petitioner went to Jack's home where he stated that Mrs. Safrin had the false receipts and was going to get in touch with her to obtain them. Jack testified that it was then agreed that both he and petitioner would continue to assert the concocted story.

Thereafter, petitioner telephoned Mrs. Safrin and spoke to Bechtel, who had gone to her house to reclaim the false receipts, having decided not to further participate in the concocted story. Upon hearing that the false receipts had been destroyed, petitioner urged Bechtel to go along with him and to make out new receipts so that they could all tell one story before the Grand Jury.

Sometime thereafter, petitioner telephoned his then partner, Liben, who had accompanied Bechtel to Scotti's office on the previous day, and hysterically berated him for having permitted Bechtel to implicate him in the course of the interview at Scotti's office. It is significant to note this very pronounced change of attitude on petitioner's part after he learned that the false receipts were no longer in existence. Thus, on the previous evening, after leaving Scotti's office, petitioner gave no indication that he was upset at Liben although he then already knew what Bechtel had told Scotti (Min. p. 591).

On the evening of December 12, 1959, Mrs. Safrin was asked to come to petitioner's home where it was suggested that she explain to Bechtel that he had not yet made any statement under oath and if he would change his story to conform to that previously agreed upon, there would be no trouble.

On the following day, December 13, 1959, petitioner met with Jack and told him that he was having difficulty. Petitioner wanted to be certain that Jack's books would show his weekly payments to his wife to support the concocted story and Jack showed him the relevant records in his possession. Jack stated that when petitioner left on that occasion, it was understood that he was to continue his efforts to get false receipts.

Petitioner vigorously denied Jack's testimony and contended that he had abandoned the concocted story on December 11, 1959, upon leaving Scotti's office. In rejecting that contention, the Referee noted that it was inconceivable that Jack would have related the concocted story to the District Attorney of New York County on December 14, 1959, as he in fact did, if he had then known that petitioner was not going to support it. What Jack did in repeating the concocted story on December 14, 1959, the Referee stated, was consistent with petitioner's own testimony before the Grand Jury that his decision to tell the truth had been reached on Sunday night, December 13, 1959, and that he had been unable to reach Jack the following morning before Jack spoke to the District Attorney (Report p. 95).

It is respectfully submitted that this extensive discussion of the evidence relating to this charge and the Referee's finding with respect thereto clearly demonstrates that the

Referee found the charge to have been established. If, as petitioner contends, the Referee merely found that he had made a false statement to Scotti, no such discussion, or conclusions that petitioner's claims were untrue, were necessary. Petitioner had at all times conceded that his statement to Scotti was untrue.

Similarly, if the Referee intended to limit his finding to petitioner's false statement on December 11, 1959, there was absolutely no purpose to his lengthy consideration of conversations and meetings participated in by petitioner on the evening of December 11, 1959, on December 12, 1959 and on December 13, 1959, after he had left Scotti's office (see, for example, Report pp. 86-8, 93-95).

Moreover, the report itself demonstrates that the Referee was fully aware of the nature of the charge before him. Thus, he begins his forty-five page discussion of the evidence by correctly referring to the charge as one of "alleged conspiracy to obstruct justice and the administration of New York City Charter" (Report p. 50).

POINT V

Disbarment for the conduct established does not violate due process.

Having strenuously contended that the four charges underlying his disbarment cannot be isolated from each other (Pet. p. 22), petitioner reverses his position and proceeds to consider each charge separately (Pet. pp. 34-5) to support his claim that the extent of discipline violated due process. Thus, for example, petitioner argues that his conviction for criminal contempt itself does not provide an adequate basis for disbarment. He cites Mr. Justice Jackson's dissent in *In re Isserman,* 345 U. S. 286, 292. His reliance upon the *Isserman* case is misplaced. In the first place, the proceeding against Isserman was predicated solely upon a contempt conviction and did not involve, as does the present case, additional charges of misconduct, the existence of which Mr. Justice Jackson indicated (at 294) would have substantially affected his views. Moreover, the *Isserman* case involved this Court's supervisory power over disciplinary proceedings in the federal courts, a power permitting standards far different than those applicable to review by this Court of disciplinary proceedings in state courts. Thus, this Court denied Isserman's petition for a writ of certiorari to review his disbarment by the New Jersey courts for the very same contempt conviction, *Isserman* v. *Ethics Committee of Essex County Bar Association,* 345 U. S. 927.

In the instant case, the reasonableness of the discipline imposed must be considered in light of the charges sustained by the Appellate Division. We respectfully submit

that the disbarment by a state court of an attorney guilty of 1) criminal contempt of court without extenuating or mitigating circumstances; 2) aiding and abetting a violation of the conflict of interest provisions of a local law concerning the operation of municipal government; and 3) participating in a scheme to obstruct the administration of justice by efforts to conceal the true facts from a law enforcement agency and to promote acceptance of a concocted story; is, on its face, not so unreasonable as to provide any basis for a claim that due process has been violated.

CONCLUSION

The petition for a writ of certiorari should be denied.

December, 1966

Respectfully submitted,

JOHN G. BONOMI
Attorney for the Association of the Bar of the City of New York, Respondent

MICHAEL FRANCK
Of Counsel